No. 89-381

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF MAINE,
Petitioner

V.

PAUL WING, et al.,
Respondents

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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I. PETITIONER'S QUESTION 1, WHETHER DRIVEWAYS ARE OUTSIDE THE CURTILAGE, IS RAISED BY THE FACTS IN THIS CASE AND NEEDS TO BE ANSWERED TO RESOLVE A CONFLICT BETWEEN THE MAINE COURT'S DECISION ON THE ONE HAND AND THE DECISIONS OF OTHER COURTS AND THIS COURT IN UNITED STATES V. DUNN ON THE OTHER.

Respondents selectively edit the Suppression Justice's findings of fact to say: "The officers took the driveway to the right and parked the car on the grassy area.... The driveway ended at the grassy area. The officers saw before them what appeared to be marijuana plants...." (Respondents' Brief in Opposition at 2-3). Respondents interpret these edited findings to mean that the police did not see

marijuana from Wing's driveway and thus the issue presented in Petitioner's Question 1, whether driveways are outside the curtilage, is not raised by this case.

The Suppression Justice in fact found, however, that the police could see from the right branch of Wing's driveway into the lawn area containing marijuana plot 3B:

> 9. The driveway into the Wing property divides into a Y at a point about 100 feet from the road. The driveway to the left leads to the Wing residence. The driveway to the right leads to a lawn area. The officers could not see into that lawn area because of a rise in the driveway until they got beyond the Y intersection.
>
> 10. The officers took the driveway to the right and parked the car on the grassy area between 4B and the screen house or gazebo (See State's Exhibit #1 attached hereto as an appendix). The driveway ended at the grassy area.

> The officers saw before them what appeared to be marijuana plants growing in a plot identified as 3B on State's Exhibit #1 [App. 56].

(App. 21-22 (emphasis added)). These findings are based on the undisputed testimony at the suppression hearing that the police saw marijuana from Wing's driveway. (Transcript of Suppression Hearing 28-29 (marijuana plot 3B seen just before Wing driveway splits into Y), 57-58 (3B visible as driving up the right branch of Wing driveway), 129 (3B seen when one-half to three-quarters up Wing driveway), 232 (3B seen from Wing driveway "[r]ight around the area of the fork"), 259 (3B seen from right branch of Wing driveway)). Because the police did see marijuana from Wing's driveway, Question 1 is raised by the facts in this case.

Respondents also claim that there is no conflict to be resolved by this Court, arguing that this case is factually distinguishable from the cases cited in the petition where the police observations were "made while on the normal and direct route of approach to the home." (Respondents' Brief in Opposition at 5). This argument ignores the fact, however, that in several of these cases the police deviated from the normal and direct route of access to the home and yet no fourth amendment violation was found. See, e.g., State v. Wilbourn, 364 So.2d 995 (La. 1978), cert. denied, 444 U.S. 825 (1979) (curtilage not violated where police entered unenclosed carport to look at front of vehicle that was visible from but not on direct route to side-door of house); State v. Pike, 143 Vt. 283, 465

A.2d 1348, 1350 (1983) (curtilage not violated where wardens, after driving up driveway, examined a vehicle and then "followed a distinct trail of blood" to another vehicle without approaching door to mobile home); State v. Brighter, 60 Hawaii 318, 589 P.2d 527 (1979) (fourth amendment not violated where officer walked to tree about 30 feet from driveway and from there saw marijuana plants that would have been visible from driveway if laundry had not obstructed view); see also State v. Corbett, 516 P.2d 487 (Or. App. 1973) (fourth amendment not violated where police do not intend to go, and in fact do not go, to front door but instead walk part way up driveway to investigate criminal activity).

Moreover, as the cited cases recognize, it makes no difference for fourth amendment

purposes that the police here took the right branch of Wing's driveway leading to the garage rather than the left branch leading to his house. In terms of "the nature of the uses to which the area is put" (United States v. Dunn, 480 U.S. 294, 301, 302-03 (1987)) and associated privacy expectations, a driveway is a driveway (cf. Arizona v. Hicks, 480 U.S. 321, 325 (1987) (Scalia, J.) ("[a] search is a search"); Dunn, 480 U.S. at 305 (Scalia, J., concurring) ("the house was a house")) regardless of whether it leads directly to the front door or leads to a garage area, as here, where people can park their automobiles and then walk to the front door or to other areas. Furthermore, when driving through woods on some rural driveways, it is not always possible to

determine which branch of a fork leads to the house, which branch to the garage, and which to outlying fields or other areas. The constitutionality of police observations should not depend on whether an officer correctly guesses the branch that leads to the front door.

Although Dunn rejected "the Government's invitation to adopt a 'bright-line rule' that 'the curtilage should extend no farther than the nearest fence surrounding a fenced house'" (Dunn, 480 U.S. at 301), there is nothing in Dunn that precludes - indeed, Dunn's four-factor analysis supports - a bright-line rule that driveways are not protected by the fourth amendment.

II. QUESTION 2, WHETHER THE LAWN AREA IS OUTSIDE THE CURTILAGE, PRESENTS AN OPPORTUNITY FOR FURTHER CLARIFICATION OF WHAT CONSTITUTES CURTILAGE.

Respondents further claim that this "case presents little opportunity to provide additional guidance to courts analyzing the curtilage question" under Dunn. (Respondents' Brief in Opposition at 6). On the contrary, this case presents a shade of gray lacking in Dunn.

In Dunn, the ranch area around the barn was like open fields (Dunn, 480 U.S. at 303-05) in that it was not the location of any activities involving an expectation of privacy. See Oliver v. United States, 466 U.S. 170, 179 (1984). This factor helped to make Dunn a relatively easy case in determining that the barn neither was part of the home's curtilage nor had its own

curtilage and that there was no reasonable expectation of privacy in the ranch area around the barn. Dunn, 480 U.S. at 302-04. In contrast, there was evidence in the instant case that Wing's outlying lawn area was used for social and sexual activities and was protected from view from a public road. Because Wing claims to have expected privacy in his activities, these facts present a closer case under the Dunn test for determining what constitutes curtilage. This case thus provides an opportunity for this Court to address a common issue not answered by Dunn - i.e., whether those sections of a large lawn area that are at a distance and separated from a house but are mowed, cultivated, or used occasionally for social, recreational, or other subjectively private activities fall within the curtilage.

CONCLUSION

For these reasons and the reasons in the petition, a writ of certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court in State of Maine v. Paul Wing, 559 A.2d 783 (Me. 1989).

Respectfully submitted,

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